

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CVS/PHARMACY  
Employer/Petitioner

and

Case 13-UC-266228

TEAMSTERS LOCAL 272  
Union

ORDER GRANTING REVIEW AND REMANDING

Pursuant to Section 102.67 of the Board's Rules and Regulations, the Employer's Request for Review of the Regional Director's Dismissal of the unit-clarification (UC) petition is granted as it raises substantial issues concerning the Regional Director's departure from officially-reported Board precedent.<sup>1</sup>

The petition seeks to exclude the Team Leader position from the bargaining unit on the basis that the employees holding that classification are allegedly supervisors under Section 2(11) of the National Labor Relations Act. The Regional Director found the petition untimely because the parties' expired contract expressly included Team Leaders in the unit, Team Leaders had been historically included in the unit, and the Employer did not assert that there have been substantial changes in the Team Leaders' duties. In so doing, the Regional Director rejected the Employer's reliance on *Washington Post Co.*, 254 NLRB 168 (1981), finding that, unlike the present case, the employer-petitioner in that case filed the UC petition immediately after an election in which the employer raised the issue of the challenged employees' supervisory status and the employer did not waive that issue.

The Regional Director erred in interpreting *Washington Post Co.* so narrowly. In *Goddard Riverside Community Center*, 351 NLRB 1234, 1234–1235 (2007), the Board interpreted *Washington Post Co.* as providing that, “where timely filed, a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included,” and that as long as the petitioner can establish that the employees holding the disputed classification are Section 2(11) supervisors, the Board clarifies the unit to exclude those employees even “where the employees sought to be excluded by a UC petition have long been included under previous contracts, and the job duties have remained unchanged[.]” 351 NLRB at 1235, citing *Washington Post Co.*, supra, and *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn. 5 (1999).

Nor did the Regional Director find that the parties stipulated to the inclusion of the Team Leader position in a representation case proceeding, which would be a “clear exception” to the

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<sup>1</sup> The Board has treated the Regional Director's dismissal letter as the equivalent of a decision in reviewing the Employer's Request for Review under Sec. 102.67 and 102.63(c) of the Board's Rules and Regulations.

Board's general policy that a UC petition is appropriate when the petitioner, as is the case here, seeks to exclude a historically-included position based on alleged Section 2(11) status. *Goddard Riverside Community Center*, 351 NLRB at 1235 (this "clear exception" is also known as the "relitigation rule"), citing and discussing *Premier Living Center*, 331 NLRB 123 (2000), and *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997). As *Goddard Riverside Community Center* makes clear, the fact that the Team Leaders have been included in the unit by way of past contracts, as the Regional Director found, is not sufficient to support dismissal under these circumstances.<sup>2</sup> 351 NLRB at 1235 & fn. 6

Accordingly, we reinstate the petition and remand it to the Regional Director for further analysis consistent with *Goddard Riverside Community Center*.<sup>3</sup>

LAUREN McFERRAN,      CHAIRMAN

MARVIN E. KAPLAN,      MEMBER

WILLIAM J. EMANUEL,      MEMBER

Dated, Washington, D.C., February 5, 2021.

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<sup>2</sup> The parties have no active contract and have not executed a successor agreement or otherwise reached an entire agreement in principle on the same; therefore, there is no current contract or agreement that would serve as a bar to processing the petition. Cf. *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994).

<sup>3</sup> The Employer filed a Request for Special Leave to File A Reply in Support of Request for Review, which the Board's Office of the Executive Secretary granted. Thereafter, the Union Filed an Opposition to the Employer's Request for Special Leave to File a Reply and Request for Reconsideration of the decision to grant the Employer's Request for Special Leave. In granting review and remanding, the Board finds it unnecessary to consider the Employer's Reply. Therefore, the Union's Request for Reconsideration is moot.